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In the Supreme Court of the United States

OCTOBER TERM, 1964

No.

INTERSTATE COMMERCE COMMISSION, PETITIONER

v.

ATLANTIC COAST LINE R. CO., ILLINOIS CENTRAL R. CO., CHICAGO & EASTERN ILLINOIS R. CO., THE BALTIMORE & OHIO R. CO., CHICAGO, BURLINGTON & QUINCY R. CO., CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC R. CO., GULF, MOBILE & OHIO R. CO., THE NEW YORK CENTRAL R. CO., WABASH RAILROAD CO., RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner Interstate Commerce Commission prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered July 8, 1964. The judgment affirmed a judgment of the United States District Court for the Middle District of Florida, entered January 9, 1963.

OPINION BELOW

The District Court entered its order denying petitioner's motion to dismiss on May 15, 1962 (R. 26).

The same court entered an opinion and judgment on January 9, 1963, reaffirming its jurisdiction to review the reports and orders of the Commission herein and deciding that the same are unlawful and should be set aside (R. 4, 27, 28–37); this opinion is reported at 213 F. Supp. 199. The opinion of the Court of Appeals and its order affirming the decision of the District Court (Appendix 1a, 14a), are reported in 334 F. 2d 46.

JURISDICTION

The final order of the Court of Appeals was entered July 8, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Where the Interstate Commerce Commission entered an order awarding reparations to a shipper against railroads did the district court have jurisdiction under Section 17(9) of the Interstate Commerce Act and 28 U.S.C. §§ 1336, 1398, to review the order in a suit brought by the railroads, or was it required to relegate the railroads to the defense of a suit brought by the shipper under Section 16(2) of the Act, thereby preserving the venue and other advantages which Section 16(2) affords to shippers?

2. If the district court possessed the requisite jurisdiction, should it nevertheless have dismissed the railroads' complaint in the exercise of a sound judicial administration, and deferred to the shipper's suit filed pursuant to section 16(2)?

STATUTES INVOLVED

The statute primarily involved is the Interstate Commerce Act, Act of February 4, 1887, 24 Stat. 379, as amended, 49 U.S.C. §§ 1 *et seq.* Portions of this Act specifically involved include sections 16(2) and 17(9), 49 U.S.C. §§ 16(2), 17(9). Other statutes which are necessarily involved, because of their relation to this Act and to the nature of the suit brought by the respondents, are 28 U.S.C §§ 1336, 1398. Petitioners also rely on the Railway Labor Act, 44 Stat. 577, as amended, 45 U.S.C. §§ 151 *et seq.* for provisions closely analogous to section 16(2) of the Interstate Commerce Act, particularly section 3 First (p) of the Labor Act, 45 U.S.C. § 153 First (p). The provisions of these statutes relevant to this case are set forth in the Appendix at 15a–17a.

STATEMENT OF THE CASE

After various administrative proceedings, the Commission issued a report finding that the rates charged the Thomson Phosphate Company on several shipments of phosphate rock from Florida to Illinois during a period extending from 1945 to 1950 were unjust and unreasonable and that the shipper was entitled to reparation.[1] When the railroads (respondents herein) refused to certify the shipper's statements showing the shipments made in the period under review, the Commission reopened the pro-

[1] *Thomson Phosphate Co.* v. *Atlantic Coast Line R. Co.*, 303 I.C.C. 25 (1958); R. 6–13.

ceeding for rehearing and determination of the exact amount of reparation due. Following these additional proceedings, the Commission issued its report on September 28, 1960, finding that Thomson was entitled to reparation from the carriers of $8,889.76 with interest,[2] and entered an order authorizing and directing respondents to pay such sum on or before December 1, 1960, later extended to August 28, 1961 (R. 18–19).

As it was the carriers' choice under the statute whether to pay or not to pay the reparation prior to enforcement of the order, the carriers chose not to pay (R. 3). Upon the failure of the carriers to pay the award, shipper Thomson filed suit pursuant to section 16(2) of the Interstate Commerce Act on August 22, 1962, to enforce the Commission's order and to collect its money in the United States District Court for the Southern District of New York in a suit entitled *Thomson Phosphate Company* v. *Atlantic Coast Line R. Co., et al.,* Civil Action No. 62–2911 (R. 3, 41–49).

Prior to the institution of the foregoing suit in New York, the affected carriers brought the present suit in Florida attacking the same report and order. The Commission moved the district court to dismiss this complaint, citing the exclusivity of section 16(2) and specifically bringing the pendency of the New York suit to the Florida court's attention during the course of the litigation. The court denied the motion

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[2] *Thomson Phosphate Co.* v. *Atlantic Coast Line R. Co.*, 311 I.C.C. 315 (1960); R. 14–17.

(R. 26). The National Industrial Traffic League, the largest single shipper organization in the country, was denied intervention as an appellant in the present suit, but was permitted to file a brief *amicus curiae.*

The district court set aside the report and order of the Commission upon concluding that it had jurisdiction under section 17(9) of the Interstate Commerce Act and 28 U.S.C. §§ 1336, 1398, 2201, and that the order was barred by the statute of limitations. (R. 27–39). The Court of Appeals affirmed the jurisdiction of the district court. (App. 1a *et seq.*).

REASONS FOR GRANTING THE WRIT

Section 16(2) of the Interstate Commerce Act provides that if a railroad does not comply with a Commission order for the payment of money, the shipper may bring suit in the district court of the United States for the district, (1) in which he resides, (2) in which is located the principal operating office of the carrier, or (3) through which the railroad runs, or in any State court of general jurisdiction having jurisdiction of the parties. In addition to the obvious advantages to the shipper of such choice of venue, Section 16(2) also provides that the shipper shall not be liable for costs in the district court ("nor for costs at any subsequent stage of the proceeding unless they accrue upon his appeal"), and that if he finally prevails he shall be entitled to a reasonable attorney's fee as a part of the costs. We submit that the Congress intended the specific procedures of Section 16 (2) to be the exclusive method for judicial review of

an order of the Commission which awards reparations, and that the court below erred in holding that such an order may be challenged in a suit brought by a carrier under the provisions of 49 U.S.C. § 17(9) and 28 U.S.C. §§ 1336, 1398, which generally govern the review of Commission orders.[3]

So far as we can ascertain, the decision below is unprecedented in holding that a railroad may institute a proceeding for judicial review of a Commission order awarding reparations to a shipper. However, the instant case is one of five suits now pending in various courts in which the railroads are now uniquely attempting to attack different reparation orders entered by the Commission, rather than await suits by shippers to enforce these orders under section 16(2) of the Act and assert their claims as defenses to such shipper suits.[4] Three of these other suits have been stayed pending the final determination of the present suit.[5] In the fourth, the United States District Court for the District of Vermont has entered an order dissolving a temporary restraining order and denying a temporary injunction, and has heard argument and

[3] The parties and the court below concur in the view that the special three-judge court provisions of 28 U.S.C. §§ 2321–2325 do not here apply.

[4] The latter and normal procedure for the enforcement and review of reparation orders is described in detail in *Meeker* v. *Lehigh Valley R. Co.*, 236 U.S. 412, 422.

[5] *Atlantic Coast Line R. Co., et al.* v. *United States, et al.*, C.A. No. 63–145-Civ.-J, U.S.D.C., M.D. Fla.; *Baltimore & Ohio R. Co., et al.* v. *United States, et al.*, C.A. No. 14897, U.S.D.C., D. Md.; and *Baltimore & Ohio R. Co., et al.*, v. *United States, et al.*, C.A. No. 15279, U.S.D.C., D. Md.

taken under advisement the question of dismissing the complaint.[6]

It is settled that general principles or statutory provisions relating to judicial review of administrative orders do not apply where Congress has expressed a purpose that the validity of a defined class of orders is to be determined by the courts in a specified procedure. *United States* v. *Ruzicka,* 329 U.S. 287; Section 10(b) of the Administrative Procedure Act, 5 U.S.C. § 1009(b). The decision below, by permitting court review at the suit of the railroad, defeats the plain Congressional purpose of requiring that the validity of orders awarding reparations be determined by the courts only in suits brought by shippers under Section 16(2) with the attendant advantages which the Congress has granted to shippers.

As to venue alone, the matter is important to shippers. Proceeding under Section 16(2), a shipper may bring suit in the Federal judicial district in which he resides; if the railroad may institute a suit attacking the reparation order, it must be brought in the judicial district in which the railroad (or one of several respondent railroads) has its principal office—which may be (as in this case) geographically remote from the shipper's chosen forum. The practical impact of the shipper's loss of his choice of venue and the ensuing increase in his litigation costs, is revealed by a review of the 22 reparation orders decided by the Commission in 1963 showing that the reparation

[6] *Central Vermont Ry. Inc., et al.* v. *United States, et al.,* C.A. No. 4010, U.S.D.C., D. Vt.

awards varied from $38.39 to $77,436.99 for a median of $853.87.[7] Clearly, the decision below, in permitting the railroad to bring a suit in the district of its venue, will discourage shippers with small claims from defending Commission orders awarding reparations to them.

The Congressional purpose in providing for attorney's fees and costs for successful shipper plaintiffs has been summarized by this Court in *Baldwin* v. *Scott County Milling Co.*, 307 U.S. 478, 482–483, as follows:

> * * * By thus laying on the carriers the burden of bringing forward evidence to overcome presumptions created against them, and by compelling them, if defeated, to pay plaintiffs' attorneys' fees in addition to the interest allowed by law, the Act unmistakably evidences purpose directly to prevent interposition of pleas lacking merit and so coercively to bring about prompt payment of the commission's awards. In *Meeker & Co.* v. *Lehigh Valley R. Co.*, 236 U.S. 412, this Court, upholding the clause as to attorneys' fees, said (p. 433): "The provision is leveled against common carriers engaged in interstate commerce, a *quasi* public business, and is confined to cases wherein a recovery is had for damages resulting from the carrier's violation of some duty imposed in the public interest by the Act to Regulate Commerce * * * One of its purposes is to promote a closer observance by carriers of the duties so

[7] The 22 orders exclude the many other informal complaints settled on the basis of these orders.

> imposed; and that there is also a purpose to encourage the payment, without suit, of just demands does not militate against its validity. And in *St. Louis & S.F. R. Co.* v. *Spiller,* 275 U.S. 156, referring to the same provision, we said (p. 159): "The purpose of Congress in making the provision concerning costs was to discourage harassing resistance by a carrier to a reparation order."

There has been no intervening change in the pertinent statutory provisions which would sustain the result reached by the decision below. To the contrary, while the court below relied heavily upon the general jurisdictional provisions of 28 U.S.C. §§ 1336, 1398, it overlooked that in the 1948 codification of Title 28, both sections were prefaced, respectively by the phrases "Except as otherwise provided by Act of Congress" and "Except as otherwise provided by law," and that these exceptions were identified, in the Reviser's Notes to Section 1398, with "section 16 of Title 49, U.S.C., 1940, ed., which provides for *jurisdiction and venue* of actions to enforce Interstate Commerce Commission orders for the payment of money" [emphasis added].

The court below apparently permitted this unique suit by the carriers outside of Section 16(2) on three grounds, none of which, in our view, sustains impairment of a clear Congressional policy.

(a) The court below apparently believed that to permit such a suit by a railroad would avoid multiple suits by shippers who rely upon the Commission's

findings in a single reparations case.[8] To begin with, the appellees have not yet demonstrated that such multiple suits are in fact a real burden upon railroads. Moreover, shippers' rights should not be determined in litigation of which they may have no knowledge. Finally, for forty years it has been the settled law that the possibility of multiple suits by shippers under Section 16(2) is not such "multiplicity of suits" as would warrant depriving them of advantages conferred by the Congress. *Pittsburgh & W.V. Ry. Co.* v. *United States,* 6 F. 2d 646, 649 (W.D. Pa. (3 judge court) 1924).

(b) Secondly, the court below further concluded that "Symmetry also suggests a Congressional purpose to allow review of an award-order granting reparations under § 17(9)." (App. 9a.) This conclusion of the lower court was predicated upon the propositions, that under *United States* v. *I.C.C.,* 337 I.C.C. 426, a shipper may obtain judicial review of a Commission order denying reparations pursuant to the general provisions of 28 U.S.C. §§ 1336, 1398, and that "the administrative determination of primary jurisdiction elements on a referral to the ICC by a Court is reviewable under §§ 17(9), 1336, 1398. *Pennsylvania R.R.* v. *United States,* 1960, 363 U.S. 202 * * *" (App. 9a). We submit that the suggested symmetry fails in two respects. First, when a shipper seeks judicial review of a Commission order denying

[8] Shippers for whose benefit such orders are made and all other shippers similarly situated may sue thereon under section 16(2). See *Mitchell Coal Co.* v. *Penna. R.R. Co.,* 230 U.S. 247, 257; *Phillips* v. *Grand Trunk Ry.,* 236 U.S. 662, 665–66.

reparations, pursuant to the general provisions of Section 17(9) of the Interstate Commerce Act and 28 U.S.C. §§ 1336, 1398, he may (indeed, must) bring it in the district in which he resides—essentially the same venue advantage which Section 16(2) of the Interstate Commerce Act gives him in a suit to enforce a Commission order awarding reparations. Secondly, the venue and jurisdictional principles of *Pennsylvania R.R.* v. *United States, supra,* were abrogated by the Congress, with the support of the Judicial Conference of the United States, in Public Law No. 88–513, 78 Stat. 695, approved August 30, 1964 (subsequent to the decision below).

(c) Third, the court below considered it important *to permit* a railroad to invoke judicial review of a Commission order awarding reparations under 28 U.S.C. 1336, 1398, so as to assure "some symmetry in the construction and maintenance of a national transportation policy," on the theory that in such a suit "the United States and the ICC are parties. The Attorney General and the General Counsel of the Commission are directly and immediately responsible for the conduct of that litigation and the advocative assertion of contentions deemed essential in the public interest." The court below pointed out, in contrast, that "in the Shipper's § 16(2) suit neither the Commission nor the Government is a party" (App. 11a–12a). With all respect to the court below, we must point out the following facts: Most reparation orders hinge upon their own peculiar facts. See *United States* v. *I.C.C.,* 337 U.S. at 442. We cannot recall any

recent suit by a shipper under Section 16(2) in which the Department of Justice or the Commission found an occasion to intervene. In the converse situation where private shippers seek judicial review of Commission orders denying reparations, the Department of Justice has for some years followed the general policy of not taking an affirmative position by filing a neutral answer, as in the instant case. Moreover, the history of the present case suggests that one result of the decision below will be to permit the transfer of the burden of defending Commission orders awarding reparations from the shipper to the Commission's legal staff—regardless of whether there is involved any issue of general transportation importance.

Finally, the decision below conflicts with the prior holdings or statements by this Court that a shipper's suit under Section 16(2) is the exclusive route by which the Congress has authorized the courts to determine the validity of a Commission order awarding reparations.

In *United States* v. *I.C.C.*, 337 U.S. 426, the Supreme Court held that an order denying reparation was reviewable and that the proper forum was a one-judge district court. The Commission had not issued any reparation order within the meaning of section 16(2), and the Supreme Court carefully noted, "Had the Commission made an award to the Government it could have filed a civil suit to recover money damages under the provisions of 49 U.S.C. § 16(2)." (at 443). This Court then properly characterized the section 16(2) suit as the "one-judge trial and appeal

procedure available for enforcement of an award order," and went on to hold that such procedure "would appear to be an equally appropriate and adequate tribunal for adjudication of validity of a Commission order denying reparation." (*ibid.*) The dissenting justices concurred in the view that section 16 "affords judicial review when an award for damages is made" (at 457); but believed that the general review provisions did not apply to Commission orders denying relief.

In *Porter Co.* v. *Central Vermont Ry., Inc.*, 366 U.S. 272, the Supreme Court again adverted to the appropriate forum for enforcement and review of orders awarding reparations. The Commission had not then issued such an order, and the Court specifically refused to consider matters relating solely to reparations, holding that, "Such an order, when and if made, can be challenged before a single judge under 49 U.S.C. § 16(2)." (at 274, note 6).

In *Washington Terminal Co.* v. *Boswell,* 319 U.S. 732, this Court affirmed by an equally divided vote a decision written by Mr. Justice Rutledge under provisions of the Railway Labor Act which are closely analogous to section 16(2). Under section 3 First (p) of the Railway Labor Act, 45 U.S.C. § 153 First (p), an employee who has obtained an award of the National Railroad Adjustment Board may file suit in the district court for enforcement if the carrier does not comply with the agency order. In the *Boswell* case, 124 F. 2d 235, the Court of Appeals for the

District of Columbia held that a carrier may not maintain a suit for a declaratory judgment of rights during the period which the Labor Act allows for the employee's enforcement suit. In words equally applicable here, Mr. Justice Rutledge noted the "definite and special scheme" for determining the legality of an award and the "detailed plan for review" in an enforcement proceeding, both of which indicated "that the method of review provided was intended to be exclusive * * *. More especially there could have been no such reason for writing into the statute the unusual and highly important special advantages given to the employees seeking enforcement" (at 240). As Mr. Justice Rutledge stated, "Congress had no purpose to give the statutory advantages to the employees if he should beat his employer to the courthouse, but to take them away if he should come in second. That is true whether the employer's suit is one to restrain enforcement of the award, set it aside, declare it void, or reinterpret the original contract with the same effects upon the award." (124 F. 2d at 242). The Court expressly cited section 16(2) as an example of a similar enforcement suit (at 249–50 and note 32); and even the dissenting judge was of the view that there were more compelling considerations for viewing the section 16(2) suit to be the exclusive remedy than an enforcement suit under the Labor Act (at 271). We submit that the grounds stated by the court below in distinguishing *Boswell* cannot justify impairment of the procedural advantages which the Congress has accorded to shippers.

CONCLUSION

The issues presented by the decision below involve questions of judicial administration and administrative law affecting or potentially affecting many shippers and which should be settled by this Court. The decision below is in conflict with applicable decisions and principles laid down by this Court. It is urged that a writ of certiorari to review the judgment of the Court below be granted.

Respectfully submitted,

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OCTOBER 1964.

747-574—64——3

APPENDIX

In the United States Court of Appeals for the Fifth Circuit

No. 20485

INTERSTATE COMMERCE COMMISSION, APPELLANT

versus

ATLANTIC COAST LINE R. CO., ET AL., APPELLEES

Appeal from the United States District Court for the Middle District of Florida.

(July 8, 1964)

Before TUTTLE, Chief Judge, and POPE* and BROWN, Circuit Judges.

BROWN, Circuit Judge: The question in this case—arising for the first time in the 75-year operation of the Interstate Commerce Act—is whether a carrier may sue to set aside a reparation award of the Commission under § 16(1) by a suit under § 17(9), 28 USCA §§ 1336, 1398, 2321–23, or must confine its challenge as a defense in the Shipper's suit when,

* Of the Ninth Circuit, sitting by designation.

where and as brought under § 16(2). The District Court upheld the right. The ICC, joined by an array of shipper interests, spiritedly challenges the holding. We think the attack is unavailing and affirm.

The facts are very simple. In response to the complaint of the Shipper,[1] the ICC awarded reparations in the amount of $8,889.76 with interest, for unjust and unreasonable rates collected for phosphate movements from Florida to Illinois during the period April 10, 1945, to December 31, 1950.[2] The order called for payment on or before August 28, 1961, the effective date of compliance, *Missouri Pacific R.* v. *Austin,* 5 Cir., 1961, 292 F. 2d 415, 418–19. On September 6, 1961, the Carrier-appellees filed a suit in the Middle District of Florida, the venue district of Atlantic Coast Line to set aside the order. Long thereafter, on August 22, 1962, the Shipper filed suit against the Carrier and other railroads under § 16(2) in the Southern District of New York for the amount of the award with interest and, of considerable importance here, attorney's fees. The Court below overruled the ICC's motions to dismiss which asserted the exclusive method of review is under § 16(2). Thereafter, on the merits, it held the award and order invalid, primarily because of the statute of limitations. 213 F. Supp. 199.[3]

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[1] Thomson Phosphate Company.

[2] Thomson Phosphate Co. v. Atlantic Coast Line R.R., 1953, 291 ICC 1, 1954, 293 ICC 369, 1958, 303 ICC 25. Not surprisingly, one of the Carrier's defenses is that in this long span of years even an impersonal corporate person had [sic] expired.

[3] By an agreed statement of the case on appeal, F.R. Civ. P. 76, the appeal presents only the question of jurisdiction. No attack is made on the District Court's decision on the merits.

The ICC asserts that the sole review of an order granting reparations under § 16(1)[4] is that provided in § 16(2).[5] The Carrier, on the other hand, insists that § 17(9)[6] expressly authorizes "a suit to enforce,

[4] 49 USCA § 16(1):

"If, after hearing on a complaint made as provided in section 13 of this title, the commission shall determine that any party complainant is entitled to an award of damages under the provisions of this chapter for a violation thereof, the commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named."

[5] Section 16(2) of the Interstate Commerce Act, 49 USCA § 16(2) provides:

"If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file in the district court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the road of the carrier runs, or in any State court of general jurisdiction having jurisdiction of the parties, a complaint setting forth briefly the causes for which he claims damages, and the order of the Commission in the premises. Such suit in the district court of the United States shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the Commission shall be prima facie evidence of the facts therein stated, and except that the plaintiff shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the plaintiff shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit."

[6] 49 USCA § 17(9):

"(9) When an application for rehearing, reargument, or

enjoin, suspend, or set aside" an order, thus setting in train the jurisdictional-procedural provisions of 28 USCA §§ 1336,[7] 1398,[8] 2321,[9] 2322,[10] and 2323.[11]

The ICC's approach is a dual one. It contends, first, that construction of all of the statutes together

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reconsideration of any decision, order, or requirement of a division, an individual Commissioner, or a board with respect to any matter assigned or referred to him or it shall have been made and shall have been denied, or after rehearing, reargument, or reconsideration otherwise disposed of, by the Commission or an appellate division, a suit to enforce, enjoin, suspend, or set aside such decision, order, or requirement, in whole or in part, may be brought in a court of the United States under those provisions of law applicable in the case of suits to enforce, enjoin, suspend, or set aside orders of the Commission, but not otherwise."

[7] 28 USCA § 1336:

"Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission."

[8] 28 USCA § 1398:

"Except as otherwise provided by law, any civil action to enforce, suspend or set aside in whole or in part an order of the Interstate Commerce Commission shall be brought only in the judicial district wherein is the residence or principal office of any of the parties bringing such action."

[9] 28 USCA § 2321:

"The procedure in the district courts in actions to enforce, suspend, enjoin, annul or set aside in whole or in part any order of the Interstate Commerce Commission other than for the payment of money or the collection of fines, penalties and forfeitures, shall be as provided in this chapter.

"The orders, writs, and process of the District Courts may, in the cases specified in this section and in the cases and proceedings under sections 20, 23, and 43 of Title 49, run, be served, and be returnable anywhere in the United States."

manifests a congressional purpose to restrict review of a reparations award to the Shipper's suit under § 16(2). Next, both as a part of that argument, and independent of it, the ICC further asserts that there is no reviewable final "order" as called for in §§ 17 (9), 1336 or 1398.

These arguments stress the non-self-executing aspects of a reparation award. Since they are "for the payment of money," the Carrier is not bound to comply under the imminence of a mandatory injunction suit brought by the ICC or the United States. § 16 (12), 49 USCA § 12(12) [sic]. Emphasizing that § 16 (2) provides only that "the findings and order of the Commission shall be prima facie evidence of the facts therein stated," the ICC urges isolated excerpts from early opinions of the Supreme Court to suggest that it is really not an order at all. Thus *Mills* v. *Lehigh Valley R.R.*, 1915, 238 U.S. 473, 482, 35 S.Ct. 888, 59 L.Ed. 1414, had this to say of § 16(2): "The statutory provision merely established a rule of evidence. It

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[10] 28 USCA § 2322:

"All actions specified in section 2321 of this title shall be brought by or against the United States."

[11] 28 USCA § 2323:

"The Attorney General shall represent the Government in the actions specified in section 2321 of this title * * *.

"The Interstate Commerce Commission and any party or parties in interest to the proceeding before the Commission, in which an order or requirement is made, may appear as parties of their own motion and as of right, and be represented by their counsel, in any action involving the validity of such order or requirement or any part thereof, and the interest of such party. * * *."

leaves every opportunity to the * * * [Carrier] to contest the claim." [12]

But we have no doubt that this award has all of the characteristics of finality so far regarded as essential to court review under statutes comparable to those here involved. *Rochester Tel. Corp. v. United States,* 1939, 307 U.S. 125, 59 S. Ct. 754, 83 L. Ed. 1147; *Columbia Broadcasting System v. United States,* 1942, 316 U.S. 407, 62 S. Ct. 1194, 86 L. Ed. 1563; *Frozen Food Express v. United States,* 1956, 351 U.S. 40, 76 S. Ct. 568, 100 L. Ed. 910; *United States* v. *Storer Broadcasting Co.,* 1956, 351 U.S. 192, 76 S. Ct. 763, 100 L. Ed. 1081; *El Dorado Oil Works v. United*

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[12] At the same term the Court stated in Meeker & Co. v. Lehigh Valley R.R., 1915, 236 U.S. 412, 430, 35 S. Ct. 328, 59 L. Ed. 644: "This provision only establishes a rebuttable presumption. It cuts off no defense, interposes no obstacle to a full contestation of all the issues, and takes no question of fact from either court or jury. At most therefore it is merely a rule of evidence. It does not abridge the right of trial by jury or take away any of its incidents."

Its sweeping assurance of a jury trial and "contestation of all the issues, * * * of fact" must now be read with considerable reservation. All acknowledge that under the doctrine of primary jurisdiction the § 16(2) court may not independently determine the merits of the unjustness or unreasonableness of rates, discriminatory practices, and the like. We may assume, without deciding, that review of such "administrative" matters subject to the expertise of the ICC in a § 16(2) suit is no less than in one under §§ 1336, 1398. It is clear that it is not greater. New Process Gear Corp. v. New York Central R.R., 2 Cir., 1957, 250 F. 2d 569, 572, cert. denied, 1958, 356 U.S. 959, 78 S. Ct. 996, 2 L. Ed. 2d 1066, citing United States v. ICC, 1949, 337 U.S. 426, 69 S. Ct. 1410, 93 L. Ed. 1451; Mitchell Coal & Coke Co. v. Pennsylvania R.R., 1913, 230 U.S. 247, 33 S. Ct. 916, 57 L. Ed. 1472: Glens Falls Portland C. Co. v. Delaware & Hudson Co., 2 Cir., 1933, 66 F. 2d 490, cert. denied, 1933, 290 U.S. 697, 54 S. Ct. 132, 78 L. Ed. 599.

States, 1946, 328 U.S. 12, 66 S. Ct. 843, 90 L. Ed. 1053. An award-order is, first, administratively final. Nothing further remains to be done by the ICC. It is not a declaration of consequences dependent on further, future action. Rather, it is positive and presently operative. It declares, first, the violation of the Act (unreasonable, unjust rates, and the like) and then finds the amount of the Shipper's claim. On the two findings, it directs the payment of the award. And as *United States v. ICC,* 1949, 337 U.S. 426, 432–33, 69 S. Ct. 1410, 93 L. Ed. 1451, and *Pennsylvania R.R. v. United States,* 1960, 363 U.S. 202, 205, 80 S. Ct. 1131, 4 L. Ed. 2d 1165, made clear, finality for the purposes of review is not to be determined solely by the terms of the order, but by whether such order "if upheld" forecloses a right or imposes an obligation. Assuming that a § 16(2) suit is necessary for the Shipper to coerce payment, the resulting court judgment is to "uphold" the award, to hold it valid. In that judicial result, the administrative proceedings have not in any sense been superseded. The critical finding of violation of the Act as an essential ingredient to recovery rests wholly and entirely upon the administrative decision of the ICC, not independent court determination, since recovery by the Shipper assumes that the primary jurisdiction aspect has withstood the restricted review, see note 12, *supra.*

Bearing in mind that the problem here is the determination of the statutory mechanism for review in reparation award order cases generally, not merely the machinery which would satisfy this particular case, we perceive additional factors giving final operative effect to the award-order no matter what happened in the Shipper's § 16(2) suit.

An award-order is in two parts, (1) the determination of violation of statutory policies, unjust, unreasonable rates, discriminatory practices, or the like, and (2) specific damage to the shipper-complainants. So long as element (1) is outstanding and not set aside, it affords the basis for a § 9 suit, 49 USCA § 9, by a shipper similarly situated without his first going through a reparation proceeding. And in *Phillips* v. *Grand Trunk W. Ry.*, 1915, 236 U.S. 662, 35 S. Ct. 444, 59 L. Ed. 774, and many others, the Court has held that a person not a party complainant to a proceeding before the ICC may, on the general finding that the rate was unjust and unreasonable, bring his independent suit in court. Of the administrative finding that the rates were unjust and unreasonable, the Court said the "finding * * * was general in its operation and inured to the benefit of every person that had been obliged to pay the unjust rate. Otherwise those who filed the complaint or intervened during the [Commission] hearing, would have secured an advantage over the general body of the public, with the result that the order of the Commission would have created a preference in favor of the parties to the record and would have destroyed the very uniformity which that body had been organized to secure." 236 U.S. 662, at 665. In addition, there is a substantial indication that in the day-to-day operations of the ICC in the fabrication and building of its own formidable body of transportation law, reparation order-awards announcing principles are regarded as precedents. Thus the opinion reports of the ICC here, note 2, *supra*, until set aside by a direct proceeding, remain outstanding precedents on the question of the statute of limitation notwithstanding the possibility that in the § 16(2) suit in the Southern District of

New York a jury might bring in a verdict for the Carrier. Even 100% success in the § 16(2) suit leaves the Carrier faced with unsatisfactory law for all to use and unsatisfactory fact findings for all shippers to use.

Symmetry also suggests a congressional purpose to allow review of an award-order granting reparations under § 17(9). It is unquestioned that if the Commission denies the Shipper's reparation complaint, review may properly be had under §§ 1336, 1338. *Cf. United States* v. *ICC,* 1949, 337 U.S. 426, 69 S. Ct. 1410, 93 L. Ed. 1451. And in a § 9 suit, 49 USCA § 9, the administrative determination of primary jurisdiction elements on a referral to the ICC by a Court is reviewable under §§ 17(9), 1336, 1398. *Pennsylvania R.R.* v. *United States,* 1960, 363 U.S. 202, 80 S. Ct. 1131, 4 L. Ed. 2d 1165.

Against this massive structure of injunctive reviewability, the Commission's thesis comes down to the assertion that Congress meant to allow court review of the grant of an award-order granting reparation only in the shipper's § 16(2) suit. In so doing, stress is laid on the procedural advantages given the shipper—(1) freedom from court costs, (2) attorney's fees if successful, (3) choice of venue, and (4) relief from the burden of making out a prima facie case by introducing in evidence the administrative findings and order. Urged as a fitting, railroad analogy is the statutory mechanism for awards under the Railway Labor Act, 45 USCA §§ 151, 153 First (p). Under this provision, an employee who has obtained an award of the National Railroad Adjustment Board may file suit in the District Court for enforcement if the carrier does not comply with the agency order.

The order is prima facie evidence of the facts therein stated. In *New Orleans Public Belt R. Commission* v. *Ward,* 5 Cir., 1950, 182 F. 2d 654, following *Washington Terminal Co.* v. *Boswell,* D.C. Cir., 1941, 124 F. 2d 235, affirmed by an equally divided court, 1943, 319 U.S. 732, 63 S. Ct. 1430, 87 L. Ed. 1694, we held that a carrier could not circumvent this statutory rights of the employee by resorting to a declaratory judgment suit.

We think the resemblance is superficial. We would think also that to import into the highly specialized aspects of carrier regulation and the statutory scheme of determination and review especially contrived for it, the cumbersome and frequently difficult distinctions between major and minor, between court decision and Adjustment Board decision, between Adjustment Board and Mediation Board, between Court and Mediation Board will hinder, not help, in achieving judicial review which is clearly guaranteed under the Administrative Procedure Act. 5 USCA §§ 1009, 1001 (d), (f), and (g).

Many reasons may be briefly summarized. The actions of the Railway Adjustment Board are not subject to the Administrative Procedure Act. The provision of 45 USCA § 153 First (p) expressly invests the Court with power to "enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the * * * Board." At the same time there is no other statutory grant of review as in § 17(9). An Adjustment Board proceeding resulting in a money award carries forward no elements of primary jurisdiction with limited, restricted judicial review. Such an award is open for full review. *Hodges* v. *Atlantic Coast Line R.R.,* 5

Cir., 1962, 310 F. 2d 438. Probably most important, that structure is hardly a model to be copied.[13]

The procedure invoked by the Carrier here is fair and efficient. Brought in the same single Judge District Court[14] in which the Shipper's complaint would be filed complaining of a denial of a § 16(1) reparation award or to review an unsatisfactory finding in a court referral proceeding upon which to base a § 9 suit, there may be a determination once and for all of the underlying validity of the Commission's findings with respect to violations of the Act (unjust, unreasonable rates, discriminatory practices, etc.) If the order *vis-a-vis* the ICC and the Carrier fails to pass muster and is therefore "not in accordance with law," 5 USCA § 1009(e), it may then be set aside. No one, whether Carrier or Shipper, will thereafter be subjected to the expense of useless litigation in numerous courts where separate § 16(2) shipper suits have been filed.

More important, this assures some symmetry in the construction and maintenance of a national transportation policy. In the injunction suit, §§ 17(9), 1336, 1398, the United States and the ICC are parties. The Attorney General and the General Counsel of the Commission are directly and immediately responsible for

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[13] The dissenting opinions in Pennsylvania R.R. v. Day, 1959, 360 U.S. 548, 554, 79 S. Ct. 1322, 3 L. Ed. 2d 1422; Union Pacific R.R. v. Price, 1959, 360 U.S. 601, 617, 79 S. Ct. 1351, 3 L. Ed. 2d 1460, pointing up serious constitutional questions emphasize what they describe as the one-sided nature of judicial review: the employee loses, he has no right of review whatsoever; the employee wins, the carrier loses, the carrier has unlimited review on facts and law.

[14] United States v. ICC, 1949, 337 U.S. 426, 69 S. Ct. 1410, 93 L. Ed. 1451; Pennsylvania R.R. v. United States, 1960, 363 U.S. 202, 80 S. Ct. 1131, 4 L. Ed. 2d 1165.

the conduct of that litigation and the advocative assertion of contentions deemed essential in the public interest. This is all the more essential where, as is quite frequent, there is an outright clash between the executive departments of the Government, the Attorney General, and the Commission. See *United States* v. *ICC,* 1949, 337 U.S. 426, 69 S. Ct. 1410, 93 L. Ed. 1451. In contrast, of course, in the Shipper's § 16(2) suit neither the Commission nor the Government is a party. Intervention, whether permissive or as a matter of right, is something less than satisfactory especially with the pendency of a number of shipper suits in a number of jurisdictions. Without intervention, the sole spokesman in behalf of the ICC's order is the private party seeking partisan relief opposed by formidable, experienced, competent counsel for the Carrier.

We cannot believe that these important considerations were derailed by Congress out of its statutory desire to accord to a Shipper some procedural benefits. Indeed, with respect to the element of shipper damage, it is entirely too soon to state that a Shipper may not under appropriate circumstances obtain the benefit of all, or a part, of these statutory advantages by intervening in the injunction proceeding. And considering the great flexibility open to an equity court, the conclusion reached here that an injunction suit may be maintained by the Carrier does not force that Court to take on the adjudication of all of the damage element claims of numerous shippers. Wide latitude would be allowed to fashion appropriate, preliminary machinery by which shipper suits could be filed in appropriate venue districts and stayed pending ultimate determination of the injunction proceeding. A decree sustaining basic validity would likely

leave for the individual § 16(2) suits only the limited issue of money damage, presumably a relatively simple matter for court or jury determination with the Shipper armed, as he is, with the working presumption from the prima facie case.

The District Court was, therefore, correct in overruling the motion to dismiss, in sustaining the right of judicial review in that Court under §§ 1336, 1398, and in rejecting the contention that review had to be in the § 16(2) suit pending in New York.[15]

AFFIRMED.

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[15] The ICC's contention that the trial court, having jurisdiction, should nevertheless have declined to exercise it for equitable considerations is without merit.

In the United States Court of Appeals for the Fifth Circuit

OCTOBER TERM, 1963

No. 20485

D.C. Docket No. 4771—Civil-J

INTERSTATE COMMERCE COMMISSION, APPELLANT

versus

ATLANTIC COAST LINE R. CO., ET AL., APPELLEES

Appeal from the United States District Court for the Middle District of Florida

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Before TUTTLE, Chief Judge, and POPE* and BROWN, Circuit Judges

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

July 8, 1964.

Issued as Mandate:

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*Of the Ninth Circuit, sitting by designation.

RELEVANT PORTIONS OF STATUTES INVOLVED

Section 16(2) of the Interstate Commerce Act, 49 U.S.C. § 16(2), provides:

> If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file in the district court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the road of the carrier runs, or in any State court of general jurisdiction having jurisdiction of the parties, a complaint setting forth briefly the causes for which he claims damages, and the order of the Commission in the premises. Such suit in the district court of the United States shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the Commission shall be prima facie evidence of the facts therein stated, and except that the plaintiff shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the plaintiff shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit.

Section 17(9) of the Act, 49 U.S.C. § 17(9), provides:

> When an application for rehearing, reargument, or reconsideration of any decision, order, or requirement of a division, an individual Commissioner, or a board with respect to any matter assigned or referred to him or it shall have been made and shall have been denied, or after rehearing, reargument, or reconsideration otherwise disposed of, by the Commission or an appellate division, a suit to enforce, enjoin, sus-

> pend, or set aside such decision, order, or requirement, in whole or in part, may be brought in a court of the United States under those provisions of law applicable in the case of suits to enforce, enjoin, suspend, or set aside orders of the Commission, but not otherwise.

Section 1336 of the Judicial Code, 28 U.S.C. § 1336, provides:

> Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission.

Section 1398 of the Judicial Code, 28 U.S.C. § 1398, provides:

> Except as otherwise provided by law, any civil action to enforce, suspend or set aside in whole or in part an order of the Interstate Commerce Commission shall be brought only in the judicial district wherein is the residence or principal office of any of the parties bringing such action.

Section 3 First (p) of the Railway Labor Act, 45 U.S.C. § 153 First (p), provides:

> (p) If a carrier does not comply with an order of a division of the [National Railroad] Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the District in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the

division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as such suit the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board.

U.S. GOVERNMENT PRINTING OFFICE: 1966